

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

JAN 17 2008

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2007-0229-PR
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
MARGARITO RUBIO,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR2003078

Honorable Robert Duber II, Judge

REVIEW GRANTED; RELIEF DENIED

Margarito Urias Rubio

Phoenix
In Propria Persona

E S P I N O S A, Judge.

¶1 Petitioner Margarito Rubio seeks review of the trial court's order denying the relief Rubio requested in his second petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P.

¶2 After pleading guilty to attempted possession of a dangerous drug for sale, Rubio was convicted and sentenced to a presumptive, 3.5-year prison term. The trial court

expressly declined to order this sentence served concurrently with a federal sentence Rubio was already serving for a related, drug-trafficking offense. In a previous, of-right petition for post-conviction relief, Rubio contended that trial counsel had been ineffective at sentencing and that the trial court had erroneously denied Rubio's pretrial motion to suppress. The trial court denied relief, and we likewise denied relief on Rubio's petition for review of the trial court's ruling. *State v. Rubio*, No. 2 CA-CR 2006-0170-PR (memorandum decision filed Jan. 9, 2007).

¶3 In March 2007, Rubio filed a "motion" for post-conviction relief pursuant to Rule 32. In it and a subsequent, supplemental petition, he again alleged trial counsel had been ineffective at sentencing, this time for failing to object to the court's alleged failure to honor the terms of his plea agreement and for failing to object to "any use" of his prior convictions by the trial court. Rubio also alleged the trial court "erred in sentencing [him] on inaccurate information." The gist of all of Rubio's claims is his assertion that, because the trial court had dismissed the formal allegation of prior convictions as part of his plea agreement, it should not have mentioned or considered his other convictions for any purpose whatever at sentencing. His claims of counsel's ineffectiveness at sentencing similarly relate to counsel's alleged failure to object to the court's mentioning his prior convictions in imposing a consecutive sentence.

¶4 Because each of these claims could have been raised in Rubio's first post-conviction proceeding, because they are basically variations of claims he has previously

raised, and because the claims fall within none of the exceptions to preclusion provided by Rule 32.2(b), they were precluded here. *See* Ariz. R. Crim. P. 32.2(a). Rather than ruling on the basis of preclusion, however, the trial court addressed the merits of Rubio’s claim that he should have received a concurrent sentence, reiterating its initial determination that the consecutive sentence imposed was warranted and appropriate.

¶5 We will not disturb a trial court’s ruling on a petition for post-conviction relief unless the court has clearly abused its discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006); *State v. Romero*, 216 Ariz. 52, ¶ 3, 162 P.3d 1272, 1273 (App. 2007). We find no abuse of the trial court’s discretion, either in its original sentencing decision or in its denial of post-conviction relief on Rubio’s precluded claims. Accordingly, although we grant the petition for review, we deny relief.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge